IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,

Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,

Respondents.

BRIEF OF RESPONDENTS

J. ROBERTSHAW
Commercial National Bank Building
Greenville, Mississippi 38701

Attorney for Respondents

Of Counsel:

ROBERTSHAW & MERIDETH
P.O. Drawer 1498
Greenville, Mississippi 38701

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PRELIMINARY ANALYSIS

From respondents' point of view, this case is unique in that in two successive decisions, Courts have rendered decisions based upon points not argued or seriously pressed by *either* party. The District Court rendered a decision on petitioner's claims on a basis of an invasion of her First Amendment rights, a point not briefed or argued by either side.[1] In fact, the entire thrust of petitioner's case at the District Court level, and the entire

[1] App., 211-213. For convenience, we adopt the system of citations used by Petitioner. Citations to appendices of respondent's brief in opposition to petition for writ of certiorari will be, "Res. App." followed by the roman numeral and page citations. Citations to the appendix filed with the Court of Appeals will be "CA. App.", followed by the page reference.

thrust of the voluminous discovery was directed at the alleged violation of the *Singleton III* type[2] decree. For example, on trial petitioner introduced no evidence on, and did not allude to her charges of First Amendment invasion in paragraphs XIX-XXI of the intervention complaint.

This case was decided by the District Court on July 2, 1975. Under the then state of law, except as limited by *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), discharge of a teacher predicated upon exercise of First Amendment rights could not stand. *Perry* v. *Sinderman*, 408 U.S. 274 (1972). The case was argued to the Court of Appeals for the Fifth Circuit on April 21, 1977. In the interim, *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), was decided, holding in essence that a teacher should not be placed in a better position because of exercise of First Amendment rights, and that a decision not to renew a non-tenured teacher's contract would not amount to a constitutional violation justifying remedial action *if* the board, in fact, would have reached the same decision not to renew in any event. *Doyle* requires specific findings on both.

Respondent's argument to the Court of Appeals was: (1) that petitioner's communications were not protected by the First Amendment, because respondent's objections were to the context in which they were made and the manner in which they were made, not to their *content*; (2) that petitioner's conduct made it impossible for a reasonable working relationship to exist between her and the principal; and (3) that in all fairness to respondents, the case should be remanded to the District Court for

[2] *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir., 1969), *rev. and remanded sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), on remand, 425 F.2d 1211 (5th Cir., 1970). The *Singleton III* provisions were contained in the District Court order of January 12, 1970. App., 3-7.

further development of the reasons for petitioner's discharge in light of the intervening decision in *Doyle*. *Stewart* v. *Bailey*, 561 F.2d 1195 (5th Cir., 1977).

Thus, to the extent that the Court of Appeals holds in this case that *no* private expression by a public employee is protected by the First Amendment, we must, in all candor, agree with petitioner and the *Amici Curiae* that the case is wrong; however, to the extent it holds that *petitioner's* speech and conduct is not protected by the First Amendment, and that the case never should have been cast in First Amendment terms, we think the case is right and should be affirmed.[3]

STATEMENT OF THE CASE

Respondents have, at all times before and since commencement of the base action in which petitioner intervened, acted in complete good faith in meeting the problems created by the need for desegregation and in proceeding forthrightly to provide a quality education within the framework imposed by the successive court orders.[4]

[3] Being put in the position of defending a ruling we did not seek and cannot in good conscience support, we feel akin to the situation of one of Mark Twain's characters who, having been tarred and feathered and being ridden out of town on a rail, may have commented, "If it waren't for the honor of it, I'd just as soon walk."

[4] Judge Clayton, in the first definitive order entered in the base action on August 10, 1966, made specific findings of fact along these lines. The relevant portion of his Memorandum Order is reproduced in Res. App., I, pp. 1a-6a. Respondents are proud of their record in this respect, and proud of the fact that Washington County and Greenville have *always* been leaders in racial harmony, and that responsible citizens (both black and white) have been willing to and have assumed roles of leadership to this end. While respondents do not desire to ride on Greenville's coattails, being only a small frog in a large pond, they have not enjoyed the publicity accorded the county's major municipality. For what it may be worth, see: "A Report on Equal Protection in the South", U.S. Commission on Civil Rights (Nov. 4, 1965), pp. 94-97; "School Desegregation in Greenville, Mississippi", U.S. Commission on Civil Rights Staff Report (August, 1977).

The task has not been an easy one.

As specifically related to this action, during the first semester of the 1969-70 year, respondents were in a freedom-of-choice configuration. The Glen Allan center served grades 1-12 and had 510 students, all black.

Following the order of January 21, 1970, the second semester began with Glen Allan serving grades 1-6, only, with 309 black pupils and 96 white [R., 63], with 12 black teachers and 11 white teachers [R., 64]. All schools in the district were re-constituted with O'Bannon serving grades 1-6 for all students in the northerly portion, and Riverside serving all students of the entire district in grades 7-12. In mid-stream, so to speak, all physical equipment (desks, lab equipment, library books, etc.) was re-distributed and all teachers were re-assigned to agree with elementary schools located at the upper and lower ends of the district and a single secondary school in the middle.

The predictable result was utter chaos, and on June 29, 1970, the District Court entered an order agreed to by both plaintiffs and defendants, re-constituting the district into three geographical attendance zones, each with an attendance center serving grades 1-12 [R., 66].

During the first semester of 1969-70, petitioner had taught at O'Bannon in the northerly part of the district; during the second semester, she taught at Riverside in the middle; at the opening of the 1970-71 session, petitioner was assigned to Glen Allan. It was following this school session that petitioner's contract was not renewed.

When Glen Allan was opened for business in the fall of 1970, it had moved from a freedom-of-choice, 12-grade center in the first semester of the preceding year to a geographically assigned student body, 1-6 grade center

in the second semester, and to a geographically assigned student body, 1-12 grade center the first semester of 1970-71.

91.5% of the student body was black [R., p. 70]. 15 of the 22 black teachers were new to Glen Allan and the system; 1 of the 7 permanently assigned white teachers was new.[5] The entire concept of a totally integrated school was brand new to the teachers, the students and the community, except for the debacle of the preceding semester.

When Leach was assigned to Glen Allan, the school had been in operation for four or five weeks without a principal. Both students and faculty had been "stirred around" three times in the space of less than one year. He had been advised "that conditions were bad" and found, on his arrival, no order or discipline, "the students were more or less walking the halls, the teachers were not properly staying in their classrooms to teach, and there appeared to be a hostile attitude between maybe—between the blacks and the whites. * * * there would be groups of older students kind of getting in gangs in the halls and it would be hard to break them up. And there were threats made by students. And there was a lack of cooperation, it seemd like, among the teachers to help." [App., pp. 79-80]

This, then, is the atmosphere in which respondents were given the task of making total integration work, and these are the conditions under which respondents had to go about the mission of providing a quality education to the pupils in their charge. This is the context in which petitioner's communications, for which First Amendment protection is claimed, were made.

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[5] Disregarding "fractional" teachers; i.e., teachers working part time at Glen Allan and part time at another attendance center. Data is from Stipulated Exhibit 4, CA App., p. 331.

SUMMARY OF ARGUMENT

Our position is simply, we agree that the opinion of the Court of Appeals is overly broad to the extent it holds *all* private communications between a public employee and the employer should not receive First Amendment protection, but we urge: (1) that the case, at trial level, never should have been cast in terms of the First Amendment; (2) that under the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the overriding need for maintenance of a viable educational system under difficult and trying circumstances outweigh petitioner's rights where her attitude was "overly critical for a reasonable working relationship to exist between [the teacher and her immediate supervisor, the principal]" [App., 44]; and (3) that if mistaken in the first two positions, in the interests of justice the case should be remanded for application of the *Doyle* two-stage inquiry into the causes for failure to renew petitioner's contract.

ARGUMENT

I

JUDGE RONEY WAS RIGHT IN HIS CONCURRING OPINION. THIS CASE NEVER SHOULD HAVE BEEN CAST IN TERMS OF THE FIRST AMENDMENT.

Throughout the period under consideration, respondents were torn between three opposing forces: (1) compliance with orders of the courts directing immediate and total integration; (2) the mores of the community, deeply rooted in generations of total segregation; and, (3) the necessity of providing a quality education to all students, black and white, in some semblance of an orderly academic atmosphere.

The circumstances existing at the opening of the first semester, 1969-70 session were tense, explosive, and not conducive to a learning situation. The first order of business *had* to be re-establishment of order and maintenance of strict discipline so that the energies of the faculty and students could be directed solely to the learning process.

We think the actions and the "communications" of petitioner evince a total lack of loyalty to respondents and to the administration. By "loyalty", we mean:

> "*Relationships*
>
> "6. *Teacher-Administrator (Loyalty).* The degree of acceptance and execution of school policy and graceful fulfillment of an assignment is an indication of the loyalty exerted by a teacher to the school district. This should be number one professional characteristic and is the leading factor in determining the success of an educational system." [6]

Measured against this standard, we refer to the following specific conduct of petitioner:

1. Under an order entered August 22, 1969, the District Court required that one out of every six full time faculty and staff members at each school be of a race different from the majority of such faculty and staff for

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[6] In *Pickens* v. *Okolona Municipal Separate School District*, 527 F.2d 358 (5th Cir., 1976), Dr. Jere Robbins, Chairman of the Department of Education, University of Mississippi, had developed a teacher evaluation instrument analyzing performance in twenty areas, rated on a scale of 1 to 5. No teacher receiving a rating of 1 in any of three items on the instrument (physical health, mental health and teacher-administrator relationships) could be considered for re-employment. The above is a direct quote from the evaluation instrument. This instrument was found by the District Court to be neither facially nor as applied discriminatory because of race or any other impermissible reason. *Idem*. 380 F.Supp. 1036 (N.D. Miss., 1974).

the 1969-70 session, and directed implementation of an upgraded concept, proposed by respondents, for grades 1-4, supplementing the existing freedom-of-choice plan, for 1970-71. [Relevant excerpts of that order constitute Appendix A to this brief.] To comply with that order, respondents had transferred two black teachers from predominantly black O'Bannon to predominantly white Riverside centers. At a PTA meeting to explain the ungraded concept to parents, petitioner and others protested transfer of these two black teachers (as to which respondents had no choice). Petitioner and between a third and a half of those present left the meeting and attempted to disrupt it by blowing automobile horns outside the gym [App., 124-126].[7] No disciplinary action of any sort was taken by respondents.

2. Following entry of the order of January 21, 1970, directing immediate re-constitution of the district schools into two elementary centers and one secondary center, petitioner and others met and protested, among other things, the proposed scheduling and teaching assignments at the new, central secondary system [App., 121-124]. Petitioner and other teachers apparently felt they should keep the same classes and roll books [App. 123].[8] This was not helpful in meeting and working with a difficult problem.

3. As a result of this teachers' meeting, doubt had arisen in the minds of the administrators as to whether

[7] Respondents point out that the action protested by petitioner and others was action responding to a specific directive of a United States court.

[8] Had each teacher been permitted to retain the same rolls and the same pupils in their classes, the necessary result would have been three segregated secondary schools being conducted at the same place, with a triplication of teaching and material resources. Not only would such an arrangement been impossible to achieve with the physical facilities at Riverside, it also would have been given short shrift by the District Court.

these black teachers would report for work. Individual letters to petitioner and other black teachers were sent, stating that reporting for duty when the secondary school re-opened in its new configuration was a condition of their continued employment. Petitioner received such a letter [App., p. 124].

4. During March of 1970, petitioner knew there was to be a "shakedown" of students at Riverside in a search for deadly weapons. She kept a knife for one of her students until after the shakedown. Later that day, this student cut another student with the knife. [App., 136-140]. Petitioner's contract for the ensuing year was nevertheless renewed.

5. After going to Glen Allan to assume the principal's position, Mr. Leach testified he held a faculty meeting, attended by petitioner, in which she appeared hostile and inferred she didn't intend to cooperate. He testified he had a further conference with her in which she stated she did not intend to cooperate and that "she didn't like Western Line District. She didn't like Morris, who was the Superintendent, or anything connected with the system." [App., 81] Although petitioner appears to deny the specific language testified to by Mr. Leach,[9] her actual conduct appears entirely consistent with her avowed intention not to cooperate with the school administration.

6. Mr. Leach used memoranda to communicate standard instructions to teachers and testified that he sent out one reminding teachers of a scheduled six-weeks test and report cards. Petitioner accosted him in the hall, while

[9] "Q. Mr. Leach testified that you told him you didn't like Western Line, or Mr. Morris, *or anyone employed by Western Line*. Do you recall such an incident" A. I can't recall that, no. Q. Did you make *such a statement*? A. No." (Emphasis added.) [App., 119] Significantly, petitioner did not deny her announced intention not to cooperate with the administration.

classes were changing, in the presence of students,[10] and objected to the memorandum.

7. Petitioner claims First Amendment protection for her objection to the use of NYC workers [11] for janitorial services, and seems to imply that they should have been employed in the principal's office where the clerical staff and the office staff was "all white". Petitioner felt that office personnel should be better integrated.[12]

Since there were no white NYC workers, respondents obviously may not be considered guilty of discriminating against the black NYC workers in job assignments. Respondents' objection to petitioner's comments with ref-

[10] Mr. Leach's version of the encounter is contained on pages 81-82 of the Appendix; petitioner's version is on pages 146-147. The only basic conflict in the two versions is the question of whether the test was a six-weeks test or a semester test, both of which would have been scheduled before school started. Respondents regard the incident as an example of petitioner's failure to cooperate with the administration, and an incident detrimental to discipline. Teachers simply do not challenge instructions from a principal in the presence of students, particularly in the atmosphere existing at Glen Allan. "This was in the presence of students. They were gathering, looking." [Appendix, p. 82]

[11] Neighborhood Youth Corps workers were students from low-income families employed under a federal program, paid with federal funds, designed to help them stay in school. Under the applicable regulations, those working at schools were employed only at hours that would not interfere with schooling and could not be used to replace employees in existing jobs. See, generally, 29 CFR, Part 50.

[12] Mr. Leach's testimony was that the NYC workers were not qualified for office work and that all were black [App., p. 68]. The "clerical staff and the office staff" at Glen Allan consisted of a single secretary for a school with 527 pupils. Other personnel who might be considered office personnel were: the principal, white; the assistant principal (petitioner's husband), black: the elementary principal, black; an elementary supervisor who worked at both Glen Allan and Riverside, half and half, white; the guidance counselor (plaintiff Hodges), black [App., 142; R. 70, 72] This comes out to an administrative staff of one and one-half whites, three blacks and a white clerk.

erence to the NYC workers is that it constituted unwarranted interference in the operation of the school, well beyond the scope of her employment as a junior high English teacher, in a matter as to which respondents had no options [App., 68]. Under 29 CFR Section 50.10(a) NYC workers were selected and referred to Glen Allan by a designated referral agency on the basis of its individual evaluations. Petitioner offered no evidence that any NYC worker was referred as qualified for office work.

8. Petitioner complains that a white was assigned the "choice" position of taking up tickets at the school cafeteria. Whether this task was a "choice" position is a purely subjective judgment on the part of petitioner, unsupported by any evidence except her characterization. The facts are that all district cafeterias were run under supervision of a district supervisor from the Superintendent's office [R., p. 72]. The Glen Allan cafeteria ("lunchroom") was managed by a black and the ticket-taker had been appointed by the district supervisor on recommendation of the black manager. [App., p. 68-69]. The Glen Allan cafeteria staff was composed of three persons, all black [R., p. 72]. Again, respondent's objection to petitioner's comments was that they constituted unwarranted interference with the operation of the school, well beyond the scope of her employment. As to the validity of the criticism, the assignment was made at the request of the black manager under whose supervision the ticket taker worked, and had the effect of integrating an otherwise all black cafeteria staff.

9. She refused to administer a standard achievement test to her class, directed by the district central office for the purpose of measuring students' progress [App., 70-74]. Although she testified that she ultimately administered the test, all evidence is that she did, in fact, refuse to give the test, and administered it only after

arrangements had been made for it to be administered by another teacher, Mrs. Butler, who did administer the test with petitioner [App., pp. 22, 96, 146]. Respondents regard this as an example of petitioner's negative attitude and refusal to cooperate with the school administration in performance of a routine assignment, specifically within the scope of her employment. Certainly, it is *not* a "graceful fulfillment of an assignment" [*Supra*, p. 7].

10. In her complaint, petitioner alleges that she distributed to the teachers of Glen Allan school "a list of grievances developed by the Black teachers of the Western Line Consolidated School District", that she and other black teachers requested and were granted an opportunity to present these grievances to the respondents' board of trustees, and that on May 3, 1971, she circulated a bulletin to the teachers of the Glen Allan school stating that a civil rights attorney would be meeting with the district teachers on May 14th [App., pp. 23-24]. These allegations were admitted by respondents [App., p. 50]. These would constitute the type of communications protected by the First Amendment, and there is a total lack of evidence that petitioner (or any other teacher) was directly or indirectly penalized in any way, shape or fashion for the exercise of those rights.

In review, respondents would regard incidents described in numbered paragraphs 1, 2 and 10 were entitled to and did in fact receive First Amendment protection. Respondents would regard the possible failure to report for duty described in 3, and the incidents described in 4, 5, 6, and 9 as clearly beyond the scope of First Amendment protection.

As to the incidents described in 7 and 8, to use the language of the district judge, they "were capable of interpretation as embodying a [protest] of racial discrimination" [Pet. App. B, p. 36a]. On the merits, petitioner's criticisms have no validity and it is not entirely

clear they related to any matter of public concern under the circumstances. Respondent's objection was not to the *content* of the criticisms, but rather to the fact that they constituted interference in the administration of the attendance center, well outside the scope of petitioner's employment, disruptive, and not conducive to an orderly educational process.

II

ON BALANCE, RESPONDENTS' INTERESTS IN OPERATING AN EFFECTIVE EDUCATIONAL INSTITUTION OUTWEIGH PETITIONER'S INTEREST IN FIRST AMENDMENT PROTECTION.

The circumstances under which petitioner's conduct occurred were difficult and trying. The success or failure of Glen Allan Attendance Center as an effective, viable educational institution was in delicate balance. Success depended totally upon the establishment and maintenance of an orderly process, and the full cooperation of every employee directed towards making the court-imposed integrated system of education function effectively. This should be said in a straightforward language, but it ought not to be necessary to do so.

The relevant testimony of Mr. Leach, the principal, on why he did not recommend renewal of petitioner's contract is summed up in these excerpts:

> "Q. And you agreed that she was a competent teacher? A. I said all along that Mrs. Givhan was a competent teacher, *if that is what she would have done instead of trying to run the school.*"
>
> App., p. 75. (Emphasis added.)

> "Q. All right, sir. Now, based upon your associations with Mrs. Givhan, did you form any opinion as to whether the school could be successfully or unsuccessfully run with her present? A. When I was

deciding on teachers for the following year and to inform the Superintendent, who in turn would inform the Board, I decided that due to her antagonism and the problems I had had with her all year long, it would be impossible for me to carry on a successful school at Glen Allan the following year with her there.

"I had decided that if she were there I couldn't be there and carry out the duties, and I was placed there and I intended to do my job, and I felt like I could not do it with Mrs. Givhan there."

App., p. 82-83.

In his letter to the Superintendent, the principal said:

"Mrs. Givhan is a competent teacher; however, on many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands.[13] *She is overly critical for a reasonable working relationship to exist between us.* She also refused to give achievement tests to her homeroom students."

App., p. 44. (Emphasis added.)

We think this case falls squarely within the balancing test of *Pickering, supra*, as stated by this Court in this quotation:

"* * * At the same time, it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting

[13] E.g., assignment of NYC workers to office work and assignment of a black as the cafeteria ticket-taker.

the efficiency of the public services it performs through its employees."

391 U.S. at 568.

After pointing out that it is neither appropriate nor feasible to lay down a general standard against which teachers' statements may be judged, this Court indicated these guidelines in attempting to strike a balance: (1) Are the statements directed towards any person with whom petitioner would normally be in contact in the course of her daily work? (2) Is there a question of maintaining discipline by immediate superiors or harmony among coworkers? and, (3) Is this the kind of close working relationship for which it can persuasively be claimed that personal loyalty and confidence are necessary for proper functioning?

Applying these guidelines to the case at bar, it cannot be disputed that the failure to renew petitioner's contract was directly based upon her direct working relationship with the principal. In the hirearchy of the school system, the principal reports directly to the superintendent and the classroom teachers report directly to and are under daily supervision of the principal. The latter is responsible for the successful operation of his attendance center, and that, in turn, is directly dependent upon the manner in which the individual teachers perform. In a small school[14] such as Glen Allan, the contact is closer than in a larger institution. The principal is charged with the duty of constant observation and evaluation of performances by each teacher under his supervision. [App., p. 30, 31] The principal, then, is in a much better position to reach a valid conclusion as to a teacher's value to the system, based upon constant, daily contact, than is a trial judge who has limited opportunity

[14] 527 pupils and 27 teachers (including Title I teachers and teacher aides). R., pp. 69, 70.

to form a judgment and then only when that teacher is putting her best foot forward.

The situation is analogous to the story about Leopold Stokowski who, receiving a compliment upon an expensive pair of handmade shoes given him by an admirer, is said to have replied, "Thank you, madam; but only I know where they pinch." Petitioner may be a competent teacher (if that was what she would do), but only her principal knows where she pinches.

As to the question of maintaining discipline or harmony among co-workers,[15] the knife incident [Paragraph 4, Point I] was a direct breach of discipline. Incidents in numbered paragraphs 6 and 9, above, are specific instances where petitioner challenged the principal's authority, and in the former, she entered into a dispute with him in the presence of students. None of these are conducive to discipline, particularly in the tense atmosphere then existing at Glen Allan.

Going to the last guidelines, the question of loyalty and working relationships between petitioner and her immediate superior, we say first that petitioner was utterly lacking in loyalty to the district or to her school. Specifically, she protested assignments of two black teachers to Riverside, done in compliance with a direct order of the District Court; she protested scheduling when the district was abruptly reconstituted under the order of January 21, 1970; there was enough doubt that she (and others) would report for duty in the new con-

[15] Both petitioner and Hodges maintain in their testimony that their differences while teaching together at Glen Allan was not disruptive. It is apparent as Leach testified [App., p. 67] that antagonism did exist between them. Hodges testified that "many times we [petitioner and Hodges] did not see eye-to-eye about things, but it wasn't to the point that we came to blows." [App., p. 97] Petitioner thought Hodges should counsel seventh and eighth grade students and seemed to resent the fact Hodges was hired to counsel less than a hundred students [App., p. 117, 118].

figuration to require a personal letter to her stating that it was a condition of continued employment; she kept a knife for one of her students during a "shakedown" for deadly weapons; at the beginning of the 1970-71 session, she avowed her intention not to cooperate with the school administration and in fact did not do so during that school year; instead of "graceful fulfillment of her assignments" [*supra*, p. 7], she specifically protested administration of a routine six weeks (or, perhaps, semester) test and a standard achievement test required of all classrooms; and she protested assignments of NYC workers to tasks normally performed by such part-time workers, and the assignment of a white to take up tickets in the cafeteria which then had an all black staff.

As to the working relationship with her principal, this "vocal critic", as termed by the trial judge, [Pet. App., p. 36a], and "outspoken" (as she characterizes herself), [App., p. 150], or "too outspoken" (as characterized by her colleague and co-plaintiff), [App., p. 97] classroom teacher had plainly and simply reached the point where a "reasonable working relationship" [App., p. 44] could not exist.

In addition to the above guidelines, we suggest that the nature of the communication and the degree of public concern should be given some weight in balancing petitioner's interests against the public interests. The specific communications here for which First Amendment protection is sought are petitioner's objections to employment of NYC workers in a janitorial capacity, and placement of a white person in the position of taking up cafeteria tickets.

At best, employment of the NYC workers was "make-do" work to help children of low-income families stay in school in grades 9-12, their selection and referral to respondents being

> "* * * based on a comprehensive evaluation of the individual's achievements, aptitudes, and interests, abilities, personal and social adjustments, work experience, health, financial resources, personal traits, and other adequate pertinent data. * * *"
>
> 29 CFR Section 50.10(a)

Had these NYC workers been qualified for office work, proof was available in the office of the referral agency to rebut the principal's statement they were not qualified for the assignments petitioner insisted upon. Absent such proof, the principal's statement must be taken at face value.

We suggest there is little, if any, public interest in affording First Amendment protection to petitioner's contention that NYC workers should be assigned to tasks for which they are not shown to be qualified, purely because of their race.

As to petitioner's criticism of a white person's assignment to the position of ticket-taker at a cafeteria with an otherwise all black staff, we suggest that the principal correctly characterizes this as a "petty and unreasonable demand." [App., p. 44]. The assignment is entirely reasonable, except for petitioner's subjective conclusion that the position was "choice" and therefore should be assigned to a black. [App., p. 116].

Given the facts, we agree with the principal that petitioner's criticisms in these areas are "petty and unreasonable". We suggest there is little, if any, public interest to be served in according First Amendment protection to these complaints.

Cases decided since *Pickering*, applying the balancing-of-interests test, are in accord with respondents' position. For examples:

> *Smith* v. *U.S.*, 502 F.2d 512 (5th Cir., 1974) (Job requirements of a staff psychologist charged with the task of administering psychotherapeutic treatment to emotionally disturbed veterans outweighed his right to wear a "peace pin");
>
> *Phillips* v. *Adult Probation Department, City and County of San Francisco*, 491 F.2d 951 (9th Cir., 1974) (Governmental interests in promoting efficiency of public services in probation department outweighed probation officer's right to display in his office posters favorably depicting persons who were fugitives from justice.);
>
> *Sprague* v. *Fitzpatrick*, 546 F.2d 560 (3rd Cir., 1976) (public declaration by first assistant district attorney to effect that the district attorney had not told the truth respecting a conflict of interest so undermined the necessary working relationship between them as to justify discharge, although assistant's criticisms concerned matters of grave public interest.); and
>
> See: Note, Mich. L.Rev. 365 (1977) (An excellent review of current law)

In summary, there is no evidence or contention whatsoever by petitioner that respondents retaliated against her, or anyone else, directly or indirectly, on account of matters clearly protected by the First Amendment. Putting together her criticisms of NYC worker assignments and of assignment of a white ticket-taker to the local cafeteria, the specific instances where she objected to routine assignments, and her announced intention not to cooperate with the school authorities (which she promptly and continually implemented), we suggest that on the whole petitioner became a liability, rather than an asset, to the school district, that she destroyed any reasonable working relationship between herself and her principal. In this case, public interest in a viable, efficient educational system far out-weighs any interest she may assert claiming First Amendment protetion for these comments.

Under all circumstances, including the difficult conditions under which respondents were struggling to emerge with a sound educational system, we think the decision not to renew petitioner's contract was justified.

III

SINCE THIS WAS A *PRE-DOYLE* CASE WHEN TRIED TO THE DISTRICT COURT, THERE BEING SUBSTANTIAL EVIDENCE IN THE RECORD THAT RESPONDENTS WOULD NOT HAVE RENEWED PETITIONER'S CONTRACT IN ANY EVENT, JUSTICE REQUIRES THAT THE CASE BE REMANDED FOR A SPECIFIC FINDING ON THAT ISSUE, SHOULD THE COURT DECIDE ADVERSELY TO RESPONDENTS' POSITIONS STATED ABOVE.

The trial judge's relevant ruling was:

> "The court is aware of the considerable problems which occurred in this school district during the establishment of a unitary system in the 1969-70-71 period. There were several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of desegregation of Western Line School District. Most happily, the passage of time [16] has dissipated the great majority of this friction. However, when the school district's decision to terminate Givhan's employment is placed into a setting contemporaneous with its conception and execution, it becomes clear to the court that the school district's motivation in failing to renew Givhan's contract was *almost* entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were *capable* of interpretation as embodying racial discrimination.

[16] *Since* petitioner's departure from the system. There were no such incidents or "unpleasant manifestations" attributable to the *white* community.

> The court conceives this to be a violation of Givhan's rights under the First Amendment to the Constitution of the United States."

Pet. App. B., p. 35a-36a. (Emphasis added.)

As we understand *Doyle's* rationale, once the plaintiff establishes that exercise of protected rights played a "substantial" part in the respondents' decision not to renew her contract, the burden then shifts to them to show that their decision not to renew would have been reached in any event, without regard to exercise of protected rights.

At the time the District Court entered its ruling, *Perry* v. *Sinderman*, 408 U.S. 593 (1972), had laid down the rule that nonrenewal of a nontenured teacher's one-year contract could not be predicated upon exercise of First or Fourteenth Amendment protected rights. Consequently, it was not necessary for the District Court to consider, and it did not consider the second-step of *Doyle*, whether respondents would have declined to renew respondent's contract for reasons independent of her exercise of First Amendment rights.

In this connection, it becomes important to note what the trial court did and did not hold. Looking at the emphasized portions of the quotation above, it held respondents' motivation of "*almost* entirely" a desire to rid themselves of a vocal critic of district policies and practices "*capable*" of interpretation as embodying racial discrimination.[17] Being "capable of" interpretation as embodying racial discrimination" and *actually* embodying

[17] There is no proof in the record whatsoever, other than petitioner's self-serving statement she was not re-hired "Because I am black" [App., p. 150], that there was any consideration of her race in respondent's decision. Note that at the same time respondents decided not to renew petitioner's contract, they re-employed her husband as assistant principal [App., p. 151]. Petitioner, a black, was replaced with a black [App., p. 83].

racial discrimination are two separate and distinct things. There is *no* finding by the trial court that there *was* any racial discrimination.

In all fairness to respondents, should they be mistaken in the preceding arguments, this case should be remanded to the trial court for a determination of whether respondents would not have renewed petitioner's contract without regard to the alleged exercise of First Amendment rights.

Stewart v. *Bailey*, 561 F.2d 1195 (5th Cir. 1977). The "almost" entirely is another way of stating that the trial court recognizes respondents had other reasons for nonrenewal, and justice should require they be afforded an opportunity to make their case on such reasons, other than exercise of First Amendment rights, if any.

CONCLUSION

We do not believe that the opinion of the Court of Appeals below, to the extent it holds public employees do not have First Amendment rights in communications with their employer, is or should be the law. However, we believe Judge Roney was right in his concurring opinion stating,

> "I concur in the result reached by Judge Gewin in this case. I think that there are probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but *I agree that the district court erred in casting this case in the First Amendment terms.*" Pet. App. A, 26a. (Emphasis added.)

In none of the incidents identified under Point I of this brief, where First Amendment rights were involved, is there any evidence, indication or suggestion that respondents retaliated, directly or indirectly, against petitioner or any other teacher for exercise of those rights.

No school can function without the cooperation and loyalty (in the sense defined above,) of its teachers, even under the best conditions. Under conditions as they existed when the principal came down to Glen Allan some four or five weeks after it began operations, with mostly new teachers and mostly new students and under strained, unfamiliar conditions, loyalty is more than a desirable quality; it is an absolute must. Petitioner's failure to cooperate, her objection to the methods used by the principal to communicate with the teachers, her objections to giving routine six weeks (or perhaps semester) tests, her objections to giving standard achievement tests, and her constant preoccupation with matters far outside the scope of her employment, taken together, had to and finally did outweigh her utility to the district as a classroom teacher. We think Mr. Leach's conclusion that petitioner was "overly critical for a reasonable working relationship to exist" [App., p. 44] between them is completely justified on the record in this cause, and that public interest in a viable educational institution outweighs petitioner's interest in First Amendment protection, if any.

In short, we think the Court of Appeals reached the right result, but for the wrong reasons. Its opinion should be modified and as modified, affirmed. Failing that, respondents should, as a matter of equity and fair play, be afforded an opportunity to demonstrate to the trial court that petitioner's contract would not have been renewed under any circumstances, entirely independently of an exercise of First Amendment rights.

Respectfully submitted,

/s/ J. Robertshaw
J. ROBERTSHAW
Commercial National Bank Building
Greenville, Mississippi 38701

Attorney for Respondents

Of Counsel:

ROBERTSHAW & MERIDETH
P.O. Drawer 1498
Greenville, Mississippi 38701

CERTIFICATE

I, J. ROBERTSHAW, attorney for respondents, hereby certify that I have this date mailed the foregoing brief to Wilson-Epes Printing Co., Inc., 707 Sixth Street, N.W., Washington, D.C. 20001, in type-written form, via United States express mail, postage prepaid, with instructions to have the same printed, filed with the Court, and served upon counsel for petitioners at the addresses shown below in accordance with the Rules of this Court, and its affidavit of such service filed with this Court:

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

DAVID M. RABBAN
One Dupont Circle, N.W.
Washington, D.C. 20036

WILLIAM VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina 27706

WILLIAM A. DOBROVIR
ANDRA N. OAKS
2005 L Street, N.W.
Washington, D.C. 20036

This 27th day of July, 1978.

/s/ J. Robertshaw
J. ROBERTSHAW

APPENDIX A

EXCERPTS FROM ORDER ENTERED AUGUST 22, 1969

* * * *

PLAN FOR SCHOOL OPERATION

SCHOOL YEAR 1969-1970

III. Faculty and Staff Desegregation and Preparation

a) The defendant board shall, within the full extent of its ability to do so, employ and assign faculty and staff members to each school or attendance center in the district so that for the school year 1969-1970, approximately one out of every six full-time faculty and staff members shall be of a race different from the majority of such school faculty and staff.

b) In determining its ability to accomplish faculty and staff desegregation the attention of the school board is directed to the decision of the Fifth Circuit Court of Appeals in the case of *United States of America* v. *Indianola Municipal School District, et al.*, #25655, April 11, 1969, 410 F.2d 626, which shall furnish the guide for the board's action in this regard.

* * * *

PLAN FOR SCHOOL OPERATION

SCHOOL YEAR 1970-1971 AND THEREAFTER

I. Student Assignment

a) All pupils residing in the district attending grades 1 through 3 shall be assigned to the new Avon Primary

Center, regardless of residence, and all teachers in grades 1 through 3 will be assigned to this center. At the primary center, pupils will be taught in small groups in an ungraded situation and advanced at the pupil's individual pace. Pupils advancing at a more rapid pace will be given an enriched education; those advancing at a slower pace will be given specialized attention and the benefits of all available resources to raise their achievement level.

b) Riverside Attendance Center will be re-constituted to accommodate grades 4 through 12 with a curriculum oriented to arts, sciences and advanced technology. O'Bannon and Glen Allan Attendance Centers will be re-constituted to accommodate grades 4 through 12 with curricula oriented to general education, technical and vocational training.

c) All students in each grade will be ranked, top to bottom, on the basis of achievement test scores and grades earned as indicative of performance levels, and on the basis of intelligence test scores as indicative of ability. The optimum capacity of Riverside Attendance Center shall be determined for each grade, 4 through 12, and sufficient top-ranked students in each grade will be assigned for optimum utilization of that center. All other students living north of Mississippi Highway No. 12 will be assigned to O'Bannon Attendance Center, and those living south of that highway will be assigned to Glen Allan Attendance Center.

d) The board shall conduct tests at any time as and when necessary for the proper functioning of its plan for the operation of its school, and such tests shall be retained and preserved by the board and made available to plaintiffs or their counsel, or the Court, upon request.